

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
CENTRAL VALLEY REGION

ACL ORDER NO. \_\_\_\_\_

ADMINISTRATIVE CIVIL LIABILITY ORDER  
IN THE MATTER OF

VIRGINIA L. DRAKE, TRUSTEE, DRAKE REVOCABLE TRUST,  
DARWIN H. AND NINA R. SIMMONS, TRUSTEES, SIMMONS FAMILY TRUST,  
AND JAMES E. SIMMONS

HUMBOLDT ROAD BURN DUMP AREA 7  
ASSESSORS PARCEL NUMBER 018-390-018  
BUTTE COUNTY

This order for Administrative Civil Liability (hereafter Order) is issued to Virginia L. Drake, Trustee, Drake Revocable Trust (hereafter “Drake Trust”), Darwin H. and Nina R. Simmons, Trustees, Simmons Family Trust (hereafter “Simmons Trust”), and James E. Simmons (hereafter “Simmons”) (hereafter jointly Discharger) based on California Water Code (CWC) Section 13350 and Section 13268(a) and (b), which authorize the imposition of Administrative Civil Liability.

The California Regional Water Quality Control Board, Central Valley Region, (Water Board) finds, with respect to the Discharger’s acts, or failure to act, the following:

1. The Humboldt Road Burn Dump (HRBD) is a contiguous collection of 15 parcels containing, in whole or in part, waste from the disposal of municipal and/or commercial operations that contains waste as defined in California Water Code (CWC) section 13050 and hazardous materials as defined in Health and Safety Code section 25260(d). Studies of the HRBD, conducted under contract to the City of Chico, characterized the waste, delineated the extent, and confirmed the need for further remediation on several properties. Studies show that the HRBD has waste containing lead exceeding hazardous waste levels in some locations and other significant hazardous and non-hazardous waste constituents that pose a threat to human health and the environment, including waters of the state.
2. The Water Board Executive Officer issued Cleanup and Abatement Order No. R5-2003-0707 (CAO) requiring cleanup of the HRBD. Most of the parcels that make up the HRBD have been cleaned up in compliance with the CAO, with the exception of two parcels referred to as Area 7 and Area 8. This Order addresses Area 7.

**Assessors Parcel Number 018-390-018**

3. Currently, Assessors Parcel Number (APN) 018-390-018 consists of 7.13 acres of essentially unimproved land near the intersection of Stilson Canyon and Humboldt Roads, in Chico, California. In the past, the land was part of a larger unimproved parcel; specifically, APN 018-390-018 was part of APN 011-780-010, and before that was part of the 98.5-acre parcel APN 011-050-116. APN 018-390-018 is also referred to as Area 7 of the HRBD.

4. A battery recycling facility is suspected of having operated on APN 018-390-018 in the past. Historic aerial photographs taken of the suspected battery recycling facility indicate that from 1937 until 1962, small structures were visible that are consistent with that type of operation. No structures are visible in Area 7 in photographs taken in 1975.
5. On 23 March 2000, soil samples were collected from Area 7, and the analyses showed the presence of lead at concentrations ranging from 27.9 mg/Kg to 8,340 mg/Kg, and pH ranging from 6.05 to 6.88 Units. These constituents constitute waste as defined in CWC section 13050. The estimated volume of waste in Area 7 is 500 cubic yards.
6. APN 018-390-018 is currently owned by Virginia L. Drake, the Drake Revocable Trust, James E. Simmons, Darwin H. Simmons, Nina R. Simmons, Simmons Family Trust. It was formerly also owned by John D. Drake. On 21 February 2001, John D. Drake deeded his ½ interest in the land to himself and Virginia L. Drake as trustees of the Drake Revocable Trust created on 23 January 2001. John D. Drake died on 22 November 2001. Virginia L. Drake, through the Drake Revocable Trust established with her deceased husband, John D. Drake, owns an undivided ½ interest, James E. Simmons owns an undivided ¼ interest, and Darwin H. Simmons and Nina R. Simmons, through the Simmons Family Trust, own an undivided ¼ interest in APN 018-390-018. Based on the current record of the Water Board, it appears that none of the other named parties in the CAO, including the City of Chico, ever owned the land, or caused or permitted the discharge of waste to the land, that is the subject of this Order.
7. On 3 March 2003, Drake Trust filed civil action in Butte County Superior Court (Case #129127) against Simmons and Simmons Trust to partition APN 018-390-018 and other land Drake Trust owns with Simmons and the Simmons Trust. Court action on the case is pending.

### **Previous Enforcement**

8. On 3 June 2003, the Water Board Executive Officer issued Cleanup and Abatement Order No. R5-2003-0707 (CAO), pursuant to California Water Code section 13304, to the reasonably identifiable parties responsible for the waste at the HRBD. The CAO defines HRBD by the following parcels and their respective owners: APN 002-180-095 and 011-030-137 (City of Chico); APN 011-030-136, 011-030-138, 011-030-139 (Thomas and Mary Fogarty Revocable Trust); APN 011-030-015 (George Scott Revocable Trust); APN 011-030-016 (Edmond and Julie Johnson); APN 002-180-089 (Donald and Yvonne Mulkey Family Trust); APN 002-180-084 (Fred and Helen Bartig Family Trust et al.; APN 002-180-086 (Marilyn Adams Revocable Trust et al.); APN 018-390-014 (Simmons Family Trust)(Area 8); APN 018-390-018 (Drake Revocable Trust et al.)(Area 7); APN 002-180-087 and 002-180-088 (Chico Development Corporation); and APN 002-180-083 (Pleasant Valley Assembly of God). In error, James E. Simmons was not named in that CAO. Therefore James E. Simmons is not subject to administrative civil liability for any violations of the CAO, but is subject to administrative civil liability for violations of the Water Code section 13267 letters.
9. The CAO requires the City of Chico, Thomas and Mary Fogarty Revocable Trust, George Scott Revocable Trust, Edmond and Julie Johnson, Donald and Yvonne Mulkey Family Trust, Fred and Helen Bartig Family Trust et al., Marilyn Adams Revocable Trust et al., Simmons Family

Trust, Drake Revocable Trust et al., Chico Development Corporation, Pleasant Valley Assembly of God, County of Butte, and North Valley Disposal Service to investigate, cleanup, and abate the effects of waste resulting from activities at the HRBD beginning 1 June 2004. The CAO does not specify a single responsible party to cleanup the 15 parcels, but requests each individual named in the CAO to submit written notification describing if they wish to maintain the City of Chico as lead responsible party and allow access to their respective properties for the purposes of investigation and cleanup by the City or whether they intend to cleanup their own parcels.

10. On 13 February 2004, Drake Trust submitted to Water Board staff a notice of intent to submit a separate Remedial Action Plan to comply with the CAO without indication of outside assistance or participation. On 15 March 2004, Drake Trust submitted a status report committing to clean up the Area 7 waste. Subsequently, Drake Trust notified Water Board and City of Chico staffs of Drake Trust's intent to remove the Area 7 waste by summer 2004, if possible.
11. On 8 July 2004, the Drake Trust and other private parties submitted a Final Remedial Action Plan (RAP) for Humboldt Road Private Properties Operational Unit that includes Area 7 and seven other parcels. The approved remedial alternative for Area 7 is excavation and off-site disposal. The RAP includes a time schedule to submit initial engineering design plan documents by 11 June 2004. On 13 July 2004, Water Board staff sent a letter to Drake Trust, with copies to Simmons and Simmons Trust, approving the RAP and requesting Drake Trust submit a Remedial Design and Implementation Plan (RDIP) on or before 13 August 2004. On 28 July 2004, Drake Trust notified Water Board staff that if Drake Trust's discussions with the City of Chico were unsuccessful, Drake Trust intended to immediately develop and submit an RDIP and initiate permitting to allow remediation work to begin in Spring 2005.
12. On 10 September 2004, Drake Trust notified Simmons and the Simmons Trust of its intent to manage and obtain all necessary permits to cleanup the Area 7 waste during Summer 2005. Drake Trust proposed to allocate clean up costs based on the percentage of property ownership and committed to keep the total overall cleanup costs to a minimum. Simmons and the Simmons Trust indicated in writing they would pay Drake Trust their fair share of the cleanup costs.
13. On 10 March 2005, Drake Trust submitted an incomplete RDIP containing three cleanup alternatives for the Area 7 and Area 8 waste. Drake Trust selected Alternative 3 (truck the 8,000 cubic yards of waste to a Class 1 landfill approximately 300 miles from the site), which is the cleanup alternative with the highest estimated total cost, \$1,400,000. Both Alternative 1 and 2 involved disposal of the waste in one of the two disposal sites constructed in 2005 at the HRBD with an estimated disposal cost of \$200,000.
14. On 11 April 2005, Simmons and the Simmons Trust notified Drake Trust that they agreed with the plan to clean up the waste at the lower estimated total cost of \$200,000 (either Alternative 1 or 2). Drake Trust did not object to Simmons and the Simmons Trust cleaning up the Area 7 waste at Simmons' and the Simmons Trust's expense. Drake Trust and Simmons Trust did not clean up Area 7 in Summer 2005 when the nearby HRBD disposal sites (either Alternative 1 or 2) were available to accept the waste.

15. On 15 April 2005, the Assistant Executive Officer, pursuant to delegation from the Executive Officer, issued an Order pursuant to CWC section 13267 to Drake Trust, Simmons, and the Simmons Trust, requiring by 20 April 2005, submittal of a technical report and time schedule describing each regulatory agency permit or authorization necessary for work to begin on Area 7, the date they intend to apply for each permit or authorization, and the date they anticipated receiving the permit or authorization (15 April 2005 13267 Order). The technical report was not submitted.
16. On 19 April 2005, the Assistant Executive Officer, pursuant to delegation from the Executive Officer, issued an Order pursuant to CWC section 13267 to Drake Trust, Simmons, and the Simmons Trust, requiring submittal of a technical report by 1 May 2005 to complete the RDIP (19 April 2005 13267 Order). The 13267 Order required the Discharger to submit a technical report describing the selected cleanup alternative and to submit a revised transportation plan for the selected cleanup alternative. The technical report was not submitted.
17. In September 2005, the Executive Officer issued the original Complaint to Drake Trust for failures to obtain regulatory permits necessary for cleanup of Area 7 waste in Summer 2005, remove waste from Area 7 in Summer 2005, pay Invoice No. 42726, submit monthly status reports, submit a regulatory permitting technical report, and submit an off-site disposal alternative/revised transportation plan technical report. The original Complaint proposed that Drake Trust pay \$100,000 in administrative civil liability.
18. The original Complaint named Drake Trust but not Simmons or the Simmons Trust because Drake Trust had made clear to Water Board staff that it had assumed responsibility to cleanup the parcel, was authorized by Simmons and the Simmons Trust as part owners of the parcel, was in control of the cleanup activities as indicated by contact with permitting agencies, and had the financial ability, in part through an agreement with Simmons and the Simmons Trust, to cleanup the Area 7 waste.
19. At the 28 November 2005 public hearing, the Water Board considered a Draft Administrative Civil Liability Order for HRBD Area 7 and received testimony from staff, Drake Trust, Simmons, the Simmons Trust, and other designated parties. The Water Board declined to adopt the Order as proposed and continued the hearing to a later date and for further consideration by the Executive Officer.
20. On 21 December 2005, the Discharger submitted payment for Invoice No. 42726. Drake Trust, Simmons, and Simmons Trust have indicated to Water Board staff that they are cooperating to commence activities to obtain necessary permits for cleanup of HRBD Area 7 in Summer 2006.
21. Virginia Drake, the Drake Revocable Trust, Darwin H. Simmons, Nina R. Simmons, Simmons Family Trust are jointly and severally responsible for cleanup of Area 7 under the CAO. To date none of these parties have fully complied with the CAO. Drake Trust, Simmons, and the Simmons Trust have failed to comply with the 15 and 19 April 2005 13267 Orders.

## **Discharger Violations**

### Failure to Obtain Regulatory Permits

23. The CAO includes Required Action 17, which requires Drake Trust and Simmons Trust obtain all local and state permits and access agreements to fulfill the requirements of the CAO prior to beginning the work in Summer 2005. On 28 July 2004, Drake Trust notified Water Board staff of its intent to secure regulatory permits necessary to cleanup the Area 7 waste.
24. On 21 December 2004, Drake Trust submitted an incomplete application for Authority to Construct with Butte County Air Quality Management District (BCAQMD). Drake Trust did not complete the application. Subsequently, Drake Trust notified BCAQMD staff to halt the project. Simmons Trust also failed to complete an application to the BCAQMD.
25. On 28 March 2005, Water Board staff sent a certified letter to Drake Trust, Simmons and the Simmons Trust providing comments on the proposed RDIP and providing a notice of intent to pursue enforcement actions. The letter set forth a list of five required regulatory permits, reminded the parties of the compliance date for cleanup to begin in accordance with Drake Trust's construction schedule, and requested the Discharger to submit copies of each complete permit application by 1 May 2005.
26. On 15 April 2005, the Water Board Assistant Executive Officer ordered the Discharger to submit, pursuant to CWC section 13267, a technical report and time schedule, by 20 April 2005, describing each regulatory agency permit or authorization necessary for work to begin on Area 7, APN 018-390-018, the date they intend to apply for each permit or authorization, and the date they anticipated receiving the permit or authorization.
27. In response, Drake Trust indicated that consultants were obtained to initiate two regulatory permits; however, Drake Trust subsequently notified these consultants to halt the project. The Discharger failed to submit the technical report and time schedule by 20 April 2005 and copies of each complete permit application by 1 May 2005.

### Failure to Implement Cleanup

28. The CAO includes Required Action 7, which requires Drake Trust and Simmons Trust submit, by 1 April 2004, 100 percent design plans and specifications for implementation of the Remedial Action Plan (RAP). Following the Water Board Executive Officer's approval of the Discharger's RAP, on 13 July 2004, Water Board staff sent a letter addressed to Drake Trust, and copied to Simmons and the Simmons Trust, requesting Drake Trust to submit design plans and specifications (RDIP) on or before 13 August 2004 for implementing the Area 7 cleanup.
29. On 28 March 2005, to complete the RDIP, Water Board staff sent a letter to Drake Trust, Simmons, and the Simmons Trust requesting them to submit a revised Confirmation Sampling Plan and Transportation Plan. Drake Trust submitted the revised Confirmation Sampling Plan but failed to submit the revised Transportation Plan by 1 May 2005. Simmons Trust also failed

to submit the revised Transportation Plan. Therefore, Drake Trust and Simmons Trust failed to complete the RDIP.

30. The CAO includes Required Action 3, which requires Drake Trust and Simmons Trust begin cleanup no later than 1 June 2004. The 28 March 2005 letter provided Drake Trust and Simmons Trust final notice of Water Board staff's intent to recommend the Water Board Executive Officer pursue additional enforcement action if final cleanup of Area 7 waste, APN 018-390-018, is not completed by 15 August 2005. Drake Trust and Simmons Trust failed to cleanup the Area 7 waste.
31. On 19 April 2005, the Water Board Executive Officer ordered the Discharger to submit pursuant to CWC section 13267 a technical report, by 1 May 2005, describing the selected off-site disposal alternative for the Area 7 waste and the revised transportation plan developed pursuant to the selected alternative. The Discharger failed to submit the technical report.

Failure to Comply with other Required Actions

32. The CAO includes Required Action 9, which requires Drake Trust and Simmons Trust to submit, on the 15<sup>th</sup> of each month, a status report to describe progress in complying with the CAO, explain any problems with compliance or delays in the schedule, and provide and plan for returning the cleanup to compliance with the CAO. Drake Trust submitted a limited number of monthly status (technical) reports from 15 March 2004 through 15 April 2005. Simmons Trust has not submitted monthly reports. Drake Trust and Simmons Trust have failed to submit monthly status reports since 15 April 2005.
33. The CAO includes Required Action 11, which requires any individual seeking to clean their parcel outside of an agreement with the City of Chico to act as their overall Responsible Party, to reimburse the Water Board for reasonable costs associated with oversight of the cleanup of that parcel. On 23 July 2005, Drake Trust and Simmons Trust failed to submit payment to the State Water Resources Control Board SLIC Program (Invoice Number 42726) to reimburse Water Board staff oversight costs for the 1 January through 31 March 2005 billing period totaling three thousand four hundred fifteen dollars and twenty-two cents (\$3,415.22). On 12 December 2005, Drake Trust and Simmons Trust submitted payment for Invoice Number 42726.

**REGULATORY CONSIDERATIONS**

34. The CAO states:  
*"If the Dischargers violate this Order, the dischargers may be liable civilly in a monetary amount provided by the California Water Code."*
35. On 28 July 2004, in violation of the CAO, Drake Trust and Simmons Trust failed to apply for the necessary permits to remove the Area 7 waste. Although Drake Trust notified Water Board staff of its intent to secure regulatory permits necessary to cleanup the Area 7 waste on APN 018-390-018, Drake Trust failed to submit complete timely applications to appropriate regulatory agencies so cleanup work could begin in accordance with the time schedule described in the RDIP.

36. On 15 August 2005, in violation of the CAO, Drake Trust and Simmons Trust failed to complete removal of hazardous waste from Area 7, APN 018-390-018.
37. From 23 July 2005 through 21 December 2005, in violation of the CAO, Drake Trust and Simmons Trust failed to submit payment to reimburse the Water Board for reasonable costs associated with oversight of cleanup of Area 7, APN 018-390-018, and Area 8, APN 018-390-014.
38. CWC Section 13304(a) states:  
*“Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharge where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up such waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts. A cleanup and abatement order issued by the state board or a regional board may require the provision of, or payment for, uninterrupted replacement water service, which may include wellhead treatment, to each affected public water supplier or private well owner. Upon failure of any person to comply with the cleanup or abatement order, the Attorney General, at the request of the board, shall petition the superior court for that county for the issuance of an injunction requiring the person to comply with the order. In the suit, the court shall have jurisdiction to grant a prohibitory or mandatory injunction, either preliminary or permanent, as the facts may warrant.”*
39. CWC Section 13304(c)(1) states:  
*“If the waste is cleaned up or the effect of the waste are abated, or, in the case of threatened pollution or nuisance, other necessary remedial action is taken by any governmental agency, the person or persons who discharged the waste, discharges the waste, or threatened to cause or permit the discharge of the waste within the meaning of subdivision (a), are liable to that government agency to the extent of the reasonable costs actually incurred in cleaning up the waste, abating the effects of the waste, supervising cleanup or abatement activities, or taking other remedial actions. The amount of the costs is recoverable in a civil action by, and paid to, the governmental agency and the state board to the extent of the latter’s contribution to the cleanup costs from the State Water Pollution Cleanup and Abatement Account or other available funds.”*
40. CWC Section 13350 states, in part:  
*“(a) Any person who (1) violates any ... cleanup and abatement order hereafter issued, reissued, or amended by a regional board ... shall be liable civilly, and remedies may be proposed, in accordance with subdivision (d) or (e).*

*(e) The state board or a regional board may impose civil liability administratively pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 either on a daily basis or on a per gallon basis, but not both.*

*(1) The civil liability on a daily basis may not exceed five thousand dollars (\$5,000) for each day the violation occurs.*

*(B) When there is no discharge, but an order issued by the regional board is violated, except as provided in subdivision (f), the civil liability shall not be less than one hundred dollars (\$100) for each day in which the discharge occurs.*

*(f) A regional board may not administratively impose civil liability in accordance with paragraph (1) of subdivision (e) in an amount less than the minimum amount specified, unless the regional board makes express findings setting forth the reasons for its action based upon the specific factors required to be considered pursuant to Section 13327."*

42. Drake Trust and Simmons Trust have violated a cleanup and abatement order and, therefore, are subject to civil liability pursuant to Water Code section 13350(a)(1) and (e)((1)(B). Since 28 July 2004, Drake Trust and Simmons Trust failed to obtain the regulatory permits necessary for cleanup of Area 7 waste from APN 018-390-018 to begin and; therefore, as of 10 February 2006, Drake Trust and Simmons Trust have been in violation of the CAO for 562 days. Since 15 August 2005, Drake Trust and Simmons Trust failed to remove waste from Area 7 and; therefore, as of 10 February 2006, the Drake Trust and Simmons Trust have been in violation of the CAO for 179 days. From 23 July 2005 through 12 December 2005, Drake Trust and Simmons Trust failed to submit payment to reimburse Water Board staff oversight costs for APN 018-390-014 and 018-390-018, and; therefore, Drake Trust and Simmons Trust violated the CAO for 142 days. The maximum liability that can be imposed by the Water Board under CWC Section 13350 is \$5,000 for each day and the minimum liability than can be imposed is \$100 for each day. Therefore, the maximum administrative liability is \$4,415,000 ((562 + 179 + 142) days times \$5,000 per day) and the minimum liability is \$88,300 ((562 + 179 + 142) days times \$100 per day).
43. Since 15 April 2005, in violation of the CAO, Drake Trust and Simmons Trust failed to submit status reports on the 15<sup>th</sup> of each month.
44. Since 20 April 2005, in violation of CWC section 13267 and/or the CAO, the Discharger failed to submit a technical report regarding regulatory permitting for the Area 7 waste.
45. Since 1 May 2005, in violation of CWC section 13267 and/or the CAO, the Discharger failed to submit a technical report regarding the off-site disposal alternative/revised transportation plan for the Area 7 waste.
46. CWC Section 13268 states:

*"Any person failing or refusing to furnish technical or monitoring program reports as required by subdivision (b) of Section 13267, or failing or refusing to furnish a statement*



*of compliance as required by subdivision (b) of Section 13399.2, or falsifying any information provided therein, is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b).*

*(b)(1) Civil liability may be administratively imposed by a regional board in accordance with Article 2.5 (commencing with Section 13323) of Chapter 5 of a violation of subdivision (a) in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs.”*

47. The Discharger is subject to civil liability pursuant to Water Code section 13268(b) for failing to submit technical or monitoring reports required pursuant to Water Code section 13267. Since 15 April 2005, Drake Trust and Simmons Trust failed to submit monthly status reports and; therefore, as of 10 February 2006, Drake Trust and Simmons Trust have been in violation of CWC Section 13267 for 301 days. Since 20 April 2005, the Discharger failed to submit a regulatory permitting technical report for the Area 7 waste and; therefore, as of 10 February 2006, the Discharger has been in violation of CWC Section 13267 for 296 days. Since 1 May 2005, the Discharger failed to submit an off-site disposal alternative/revised transportation plan technical report for the Area 7 waste and; therefore, as of 10 February 2006, the Discharger has been in violation of CWC Section 13267 for 285 days. The maximum liability that can be imposed by the Water Board under CWC Section 13268 is \$1,000 for each day. Therefore, the maximum administrative civil liability is \$882,000 ((301 + 296 + 285) days times \$1,000 per day).
48. As described in Findings 42 and 47, the maximum administrative civil liability allowed pursuant to CWC Section 13350 and 13267 is \$5,297,000 (\$4,415,000 + \$882,000). The minimum administrative liability allowed pursuant to CWC Section 13350 is \$88,300. CWC Section 13267 does not provide for a minimum liability.
49. On 10 February 2006, the Water Board Executive Officer issued revised Administrative Civil Liability (ACL) Complaint No. R5-2005-0524 in the amount of \$100,000 to the Discharger for violations of the CWC Section 13304 and 13267, including failures to obtain regulatory permits necessary for cleanup and removal of Area 7 waste during Summer 2005, submit timely payment for Invoice Number 42726, submit monthly technical reports, submit a regulatory permitting technical report, and submit an off-site disposal alternative/revised transportation plan technical report. Revised ACL Complaint No. R5-2005-0524 was not paid or settled.
50. As of the date of this Order, the Discharger has failed to obtain regulatory permits necessary for cleanup of Area 7 waste, remove waste from Area 7, submit monthly technical reports, submit a regulatory permitting technical report, and submit an off-site disposal alternative/revised transportation plan technical report. The off-site disposal alternative/revised transportation plan technical report, a part of the RDIP, and several regulatory agency permits must be issued for cleanup of the Area 7 waste to occur during Summer 2006. The monthly technical reports must be submitted to determine compliance with the CAO.

51. CWC Section 13327 states:

*“In determining the amount of civil liability, the regional board ... shall take into consideration the nature, circumstance, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters as justice may require.”*

52. The Water Board has considered the following with respect to the factors in CWC Section 13327:

The nature of the violations is that the Discharger failed to obtain permits necessary to proceed with cleanup in compliance with the CAO, failed to cleanup the waste in compliance with the CAO, failed to pay oversight costs in compliance with invoices from the State Water Resources Control Board and as required by the CAO, failed to submit technical reports as required by the CAO and Water Code section 13267 Orders, and failed to complete technical documents necessary to assure compliance with mitigation measures in the California Environmental Quality Act Environmental Impact Report with respect to transportation of waste. The specific violations are described in Findings 35 through 37, 42 through 45.

The circumstances are that the Discharger was aware of the required dates to submit permits, remove Area 7 waste, submit payment for State Water Resources Control Board SLIC Program Invoice Number 42726, submit monthly technical reports for the Area 7 waste, submit a regulatory permitting technical report for the Area 7 waste, and submit an off-site disposal alternative/revised transportation plan technical report for the Area 7 waste. No party subject to this action has contested the CAO or the 13267 Technical Report Orders.

The extent of the violations for Area 7 wastes are that, as of 10 February 2006, complete applications for the required regulatory permits to remove waste have not been submitted; the waste has not been removed; the May 2005 through January 2006 monthly technical reports have not been submitted; a regulatory permitting technical report has not been submitted; and an off-site disposal alternative/revised transportation report has not been submitted.

The gravity of the violations is that the waste was not cleaned up in a timely manner, that it continues to pose a threat to the environment and public health, and that staff and other public resources are wasted on continued efforts to obtain compliance.

In particular, the Discharger failed to submit complete applications to allow regulatory agencies time to issue the required regulatory permits to remove the Area 7 waste during summer 2005, while other HRBD wastes were undergoing cleanup and while there was sufficient capacity in two adjacent and permitted disposal cells to accept Area 7 waste. The Discharger's failure to obtain the required permits may have increased the disposal costs for the Area 7 waste, which may need to be transported 300 miles away (Alternative 3) instead of on adjacent parcels (Alternatives 1 or 2).

The Discharger failed to remove the Area 7 waste as required before 15 August 2005. Waste removal activities are not permitted while Hank Marsh Junior High School is in session (16 August 2005 to 1 June 2006) and, therefore, will not be able to be removed until next summer. The waste will continue to pose a threat to human health and the environment, including waters of the state for nearly another year. Rain and wind may result in erosion and dispersion of the waste, including lead, from Area 7. Although the Area 7 waste is fenced and posted, trespass may occur.

The Discharger failed to submit timely payment for oversight costs. The Discharger's failure to submit such payment undermines the State Water Resources Control Program Cost Recovery Program, and is a priority violation as defined in the State Water Resources Control Board Water Quality Enforcement Policy.

The Discharger's failure to submit monthly technical reports has resulted in little communication between the Discharger and Water Board staff. Without communication, Water Board staff is unable to assist the Discharger in maintaining compliance with the CAO or to assure protection of human health and the environment.

At the request of Water Board staff, state and local regulatory permitting agencies were prepared to expeditiously process the Discharger's permit applications so cleanup of the Area 7 waste could occur in Summer 2005. The Discharger's failure to comply with orders to seek required permits is a priority violation, as defined in the State Water Resources Control Board Water Quality Enforcement Policy.

The Discharger's failure to complete the transportation plan prevented Water Board staff from assessing the impact of the cleanup alternative on other cleanups occurring at the HRBD and to address community concerns about potential traffic issues in the area. The Discharger's failure to comply with orders to submit an adequate traffic plan is a priority violation, as defined in the State Water Resources Control Board Water Quality Enforcement Policy.

With respect to the Discharger, it has not been demonstrated that there is an inability to pay or to continue in business.

With respect to voluntary cleanup efforts, the Discharger has not undertaken any voluntary cleanup efforts other than investigation of the site, hence the issuance of the CAO and the revised ACL complaint.

With respect to degree of culpability, Drake Trust had made clear to Water Board staff that Drake Trust assumed responsibility to cleanup the parcel to the exclusion of other responsible parties, was authorized by Simmons and the Simmons Trust as part owners of the parcel to clean up the parcels, was in control of the cleanup activities as indicated by contact with permitting agencies, and has the financial ability, in part through an agreement with Simmons and the Simmons Trust, to clean up the Area 7 waste. Simmons and the Simmons Trust are also culpable because they received the Water Code section 13267 orders, which were sent by certified mail addressed to all parties and they

also were sent other letters that set forth the requirements and chose not to comply. Submitting the required permit applications and technical reports should have taken minimal effort. The Discharger is, therefore, fully culpable for the violations.

With respect to economic savings, the Discharger has benefited by delaying the expenditure of funds necessary to complete the required regulatory permit applications, cleanup the Area 7 waste, submit timely payment for oversight costs, and complete the required technical reports. At a minimum, based on a rate of 5% per annum, the Discharger has benefited by \$5,311 in interest savings by failing to submit five complete regulatory permit applications and complete the Area 7 waste cleanup by 15 August 2005. The Discharger has benefited, a minimum of \$10,000, by failing to submit the eight monthly technical reports, a regulatory permitting report, and an off-site disposal alternative/revised transportation report. In addition, the Discharger has benefited \$68 by failing to submit timely payment for Invoice Number 42726. The Discharger's total minimum economic savings is \$15,379. Further, the Discharger's failure may result in significantly increasing cleanup costs for the Area 7 waste from \$12,500 (Alternative 1 or 2), which may no longer be available, to \$87,500 (Alternative 3).

Drake Trust is only a 50 percent owner of Areas 7 and 8, but clearly exhibited apparent control of activities on the parcels. For example, approval was given by Simmons and the Simmons Trust to allow the Chico Redevelopment Agency to place air-monitoring equipment (required by the BCAQMD) on Areas 7 and 8. However, Drake Trust denied "right of entry" and demanded that the air-monitoring equipment be removed and placed on property not under the Discharger's control. Drake Trust exhibited similar control over cleanup activities related to compliance with the 2003 CAO. Drake Trust's sudden cessation of compliance activities late in the schedule to cleanup in 2005 precluded Simmons and the Simmons Trust from proceeding with cleanup during the 2005 construction season. However, neither the Simmons nor Simmons Trust have appeared to make alternative efforts to achieve compliance.

Water Board staff expended approximately 150 hours, or \$12,000 in staff costs in generation of the original Area 7 ACL complaint, revised Area 7 ACL complaint, and preparation of the agenda material for the Water Board presentation. The hours have been reported to the State Water Resources Control Board SLIC Program database for future invoicing to the Discharger.

The Discharger does not have a history of previous violations.

53. Administrative Civil Liability in the amount of \$100,000 is appropriate based upon the Findings in this Order, including 42 through 45, 47, 48, and consideration of the factors in Finding 52.
54. Issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code Section 21000, et. seq.), in accordance with Section 15321(a)(2), Title 14, of the California Code of Regulations.

55. Any person affected by this action of the Water Board may petition the State Water Resources Control Board (State Board) to review the action in accordance with Section 2050 through 2068, Title 23, California Code of Regulations. The petition must be received by the State Board within 30 days of the date of this Order. Copies of the law and regulations applicable to filing petitions are available at [http://www.waterboards.ca.gov/wqpetitions/wqpetition\\_instr.html](http://www.waterboards.ca.gov/wqpetitions/wqpetition_instr.html) and will be provided upon request.

IT IS HEREBY ORDERED that the Regional Water Quality Control Board, Central Valley Region, imposes upon Virginia L. Drake, Trustee, Drake Revocable Trust, James E. Simmons, Darwin H. and Nina R. Simmons, Trustees, and Simmons Family Trust administrative civil liability in the amount of \$100,000 in accordance with California Water Code Section 13350 and Section 13268. Payment shall be made within 30 days of the date of this Order, and shall be in the form of a certified check made payable to the *State Water Resources Control Board Cleanup and Abatement Account*. The check shall have written upon it the number of this Order.

I, PAMELA C. CREEDON, Executive Officer, do hereby certify the forgoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Central Valley Region, on \_\_\_\_\_.

\_\_\_\_\_  
PAMELA C. CREEDON, Executive Officer

\_\_\_\_\_  
(Date)

KLC: sae  
02/24/06